

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KIBERA**  
**CRIMINAL APPEAL NO. 7 OF 2025**

**KELVIN WAWERU .....APPELLANT**

**VERSUS**

**REPUBLIC.....**  
**RESPONDENT**

*(Being an appeal against the original conviction and sentence delivered on 29<sup>th</sup> July 2025 by Hon. C.Njagi (PM) at Kibera Chief Magistrate's Court, Criminal Case No.E1990 of 2023 Republic vs Kelvin Waweru)*

**JUDGEMENT**

1. The appellant was charged and, after a full trial, convicted by the Subordinate Court of the offence of Preparation to Commit a Felony Contrary to section 308 (1) of the Penal Code. He was sentenced to serve 7 years' imprisonment.
2. Being aggrieved, he filed an appeal challenging his conviction and sentence. In his petition of appeal, the appellant challenged the totality of the prosecution's evidence against which he was convicted. He urged the court to quash his conviction and set aside the sentence imposed.
3. This is the first appellate court and in **Okeno v. R [1972] EA 32**, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence which was before the trial court and come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.
4. The Prosecution called a total of three (3) witnesses in support of its case. PW1, Corporal Richard Tanui, testified on oath that on 28<sup>th</sup> September 2024 at about 10:00 a.m., he was on duty

together with fellow officers when they received information from members of the public that a young man in the area had been stealing from the neighbourhood. The members of the public led the officers to an iron-sheet house consisting of a single room. The officers knocked on the door and it was opened by the appellant.

5. PW1 stated that they identified themselves as police officers and informed the appellant that they intended to conduct a search of the premises. According to his testimony, Police Constable Frankline Aura conducted the search. During the search, they recovered several items including a homemade pistol, a smoke jacket, a firearm holder, assorted pieces of jungle green police uniform, assorted mobile phones and batteries, and two television sets.
6. PW1 further testified that an inventory of the recovered items was prepared and the appellant signed the same. The appellant was thereafter arrested. PW1 added that the appellant led them to another house belonging to his friend, where a further search was conducted and assorted jungle green police uniform pieces were recovered. The friend was also arrested for being in possession of suspected government stores. Both suspects were taken to Muthangari Police Station for interrogation, where they claimed that the items had been obtained from a dumpsite.
7. During cross-examination, PW1 maintained that the officers had been directed to the appellant's house by members of the public and that the recovered items were found therein. He further stated that neighbours were present during the search and witnessed the recovery of the items.

8. PW2, Police Constable Frankline Aura, corroborated the testimony of PW1. He testified that they had received information that the appellant had been terrorising residents in the neighbourhood. Acting on that information, they were directed to the appellant's house where they identified themselves as police officers and conducted a search. During the search they recovered a homemade pistol, a smoke jacket, cut pieces of jungle green police uniform, assorted mobile phones and batteries.
9. PW2 further testified that the appellant led the officers to another house belonging to one Sylvester Wanjala where additional jungle green uniform materials were recovered.
10. During cross-examination, PW2 stated that the items recovered from the appellant's house were listed in an inventory which the appellant signed. He further clarified that the pieces of material and the jungle green coat were recovered from the house of the said Wanjala.
11. PW3, Police Constable Peter Ojwang of Muthangari Police Station, testified that PW1 and PW2 brought the appellant and his associate to the station together with the recovered items. He stated that he prepared an exhibit memo form and forwarded the suspected firearm to the Ballistics Section for examination. A report dated 9 December 2024 was prepared by the ballistic examiner, Balani Kahi, which indicated that the item recovered was a homemade pistol modified to have a chamber for a bullet but which was incapable of firing.
12. During cross-examination, PW3 confirmed that the inventory had been prepared by PW1 and that the appellant signed it. He further stated that although the homemade gun lacked a trigger

and could not fire, it could nonetheless resemble a firearm and potentially deceive someone into believing that it was a real gun. During re-examination, he stated that he was present when the appellant signed the inventory.

13. In his defence, the appellant denied the allegations and stated that he had been arrested while sleeping at the house of one Brian Omondi. He stated that his mother had requested Brian to allow him to sleep there and maintained that the recovered items did not belong to him.
14. During cross-examination, the appellant alleged that he had been coerced and threatened into signing the inventory. He further stated that he only slept at the said house and would leave thereafter, adding that he had stayed there for approximately two weeks prior to his arrest.
15. The appeal was canvassed by way of written submissions which have been duly considered and there is no need to rehash them.
16. Section 308(1) of the Penal Code provides thus;

**“Any person found armed with any dangerous or offensive weapon in circumstances that indicate that he was so armed with intent to commit any felony is guilty of a felony and is liable to imprisonment of not less than seven years and not more than fifteen years.”**

17. The Court of Appeal in **Manuel Legasiani & 3 others v Republic**[2000] eKLR defined the offence as follows;

*“The word 'Preparation' is not a term of art. In its ordinary meaning it means “the act or an instance of preparing” or “the process of being prepared”. This is the meaning ascribed to the word “Preparation” in the Concise Oxford*

*Dictionary, Eighth Edition. To prove the offence in question some overt act, to show that a felony was about to be committed, has to be shown. Mere possession of a fire-arm not coupled with such an overt act is not an offence under section 308(1) of the Penal Code.”*

18. In **P v Murray (14 Cal. 159)** it was held that:

*“Preparation consists in devising or arranging the means or measures for the commission of the offence; the attempt is the direct movement toward the commission after the preparations are made.”*

19. In view of the foregoing judicial precedent, it is intrinsic that the prosecution proves the felonious intent on the part of the appellant or the preparation to execute a felony. This can be seen from the circumstances under which the appellant was arrested. The phrase “**dangerous or offensive weapon**” is not defined in Section 308 of the Penal Code or in Section 4 – the interpretation section of the Penal Code. Section 89(1) of the Penal Code creates the offence of possession of a firearm or other “**offensive weapon**” etc and Section 89(4) of the Penal Code defines “offensive weapon” for purposes of section 89 as meaning:

**“any article made or adapted for use for causing injury to the person or intended by the person having it in his possession or under his control for such use”.**

20. It can therefore be argued that, although the home-made pistol cannot fire, it can suffice to be a dangerous weapon in terms of Section 308 of the Penal Code if the appellant, in wielding it in

the cause of burglary, intends to use it for burglary or causing injury to any person.

21. PW1 and PW2 testified that they received information from members of the public about the appellant terrorizing people. They went to his house, and upon searching, they found a homemade pistol, a smoke jacket, a firearm holder, assorted pieces of jungle green police uniform, assorted phones and batteries, and two (2) TV sets.
22. When placed on his defence, the appellant did not rebut the cogent and credible evidence of the prosecution. The appellant stated that there was no landlord who was called to verify that the said house belonged to him. However, when the items were found in his house the appellant signed the inventory of the recovered items. At the first instance, I find that the appellant would have denied the ownership of the said items and house. I find that his defence was thus a mere afterthought and denial of the items and the case that he was facing.
23. The prosecution has successfully navigated the evidentiary burden, proving all essential elements of defilement. The conviction is hereby affirmed.
24. The appellant was sentenced to serve seven (7) years imprisonment. During sentencing, the court considered the pre-sentence report, the appellant's mitigation, and that he was a first offender and sentenced the appellant accordingly. In the premises, I see no reason to interfere.
25. In the end, the appeal is found to be lacking in merit and is dismissed in its entirety.

**Judgement dated and delivered virtually this 11<sup>th</sup> March  
2026**

**D. KAVEDZA**  
**JUDGE**

**In the presence of:**

ORIGINAL FILE COPY